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No. 93-613

In The

Supreme Court of the United States

October Term, 1993

TESORERIA GENERAL DE LA SEGURIDAD SOCIAL DE ESPANA,

Petitioner,

vs.

BANCO DE CREDITO INDUSTRIAL, S.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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APPENDIX

Appendix A — Decision of February 12, 1993 of the Superior Court of Justice of Andalucia 1a

I

Pursuant to Supreme Court Rule 15.6, the Petitioner[1], Tesoreria General de la Seguridad Social de España (Tesoreria General), respectfully submits this Reply Brief.

FURTHER REASONS FOR GRANTING THE WRIT

I.

PROPER TREATY INTERPRETATION AND INTERNATIONAL COMITY ARE IMPERILED BY THE FIFTH CIRCUIT'S DECISION.

This petition raises significant issues of treaty interpretation and international comity. As already discussed at length, Pet. 9-16, it involves the proper amount of respect a court of the United States should extend to the authentic treaty interpretations of a friendly, foreign sovereign. Respondent's attempts to obfuscate the issues with mistranslations, misstatements, and half-truths on the underlying, substantive question (the proper construction, as a matter of Spanish internal law, of the 1926 Brussels Convention on Maritime Liens), which admittedly does not rise to Rule 10 proportions, is a transparent ploy which the Court should recognize. The overriding principle of deference to a foreign Executive branch's interpretation of a treaty is of immense significance and is the real issue presented to this Court. The Fifth Circuit's decision, Pet. 12a-19a, arrogates substantial judicial authority and utterly ignores the Spanish goverment's authenticated and authoritative interpretations of the 1926 Convention.

The Fifth Circuit's methodology of treaty interpretation *might*

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1. Petitioner's list of interested persons and Rule 29.1 notation are set forth at page ii of their petition. Those listings remain current and no amendment is necessary.

have been appropriate if the dispute raised in this case, concerning priority of liens, were being decided as matter of United States admiralty law. It is not, as all the parties and the court below conceded. Pet. 11a-12a. Likewise, the Fifth Circuit's digression into extrinsic approaches to treaty interpretation, Pet. 12a, 13a-19a, *might* be deemed valid if, despite the case being decided under Spanish internal law, the United States was also a party to the 1926 Convention and the court found a conflict between the two countries' constructions. This is not the case here, as the United States is not a signatory to the 1926 Convention.

BCI attempts to mislead this Court by stating that the Fifth Circuit followed the proper and customary methods of treaty interpretation in ignoring the official Spanish position and following instead the language of the 1926 Convention. In fact, the clear language of the treaty compels the result opposite to that reached by the Fifth Circuit. The language of Article 2(2) of the 1926 Convention is extremely broad and on its face includes social security contributions, and numerous signatory nations, as well as renowned experts in the field of maritime liens, have stated that the treaty should be interpreted in the manner advanced by Tesoreria General and the Spanish officials. Even under BCI's best case scenario, the language of the treaty is ambiguous, in which case it was clearly improper for the court not to defer to the interpretation ordained by the Spanish Executive branch.[2] Ultimately, what other

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2. Respondent also contends that the issue of deference to the Spanish authorities is not properly before this Honorable Court because it was first raised in Petitioner's reply brief. Op. Cert. i 7-8. To the contrary, Tesoreria General has maintained all along that the courts must defer to the official Spanish position with regard to how the 1926 Convention should be interpreted and applied as Spanish law in this case. The district court actually attempted to ascertain the Spanish Government's intent; but it relied upon the wrong evidence. Instead of focusing on the declarations of the Spanish officials, it relied upon outdated and unofficial statements contained in JIGE reports and other irrelevant evidence (Cont'd)

countries, experts, or even the Fifth Circuit, might think, is irrelevant, since only *Spain's* interpretation is at issue.

Proper treaty interpretation compels deference to the declaration of a foreign executive branch, *not* the method used by the Fifth Circuit. There is not doubt that courts in this country defer substantially to the treaty interpretations proffered by the Executive branch. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *United States v. Pink*, 315 U.S. 203, 220-21 (1942); *Nielsen v. Johnson*, 279 U.S. 47, 52-53 (1929); *Terrance v. Thompson*, 263 U.S. 197, 223 (1923); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 307 (1829). As a matter of Spanish internal law, this deference is complete. Indeed, the fundamental misstep of the Fifth Circuit's decision was to equate Spanish, civilian methods of *statutory* interpretation with those of treaty construction. The court below said:

> Spain's legal system is civilian in nature. Therefore, the role of positive legislation is emphasized at the expense of stare decisis. To correctly interpret Spanish law, we look first to

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(Cont'd)

submitted by BCI. (Incredibly, BCI continues to rely on these reports, whose accuracy has been completely undermined.) Since the district court simply relied upon the wrong evidence as to what constitutes Spain's official position, Tesoreria General had no reason to suspect that the Fifth Circuit would completely ignore accepted principles of treaty interpretation and digress into its own unique brand of foreign treaty interpretation. Because the precise error addressed herein was first made by the appellate court, it is only logical that the error would be brought to light in a petition for rehearing. For BCI to suggest that the issue was waived is ludicrous. A careful reading of the Fifth Circuit's decision indicates that it addressed these issues. *See* Pet. 12a. The Fifth Circuit also gave judicial notice to "affidavits submitted by the parties," Pet. 12a n. 11, including those memorializing the Spanish government's interpretation of the 1926 Convention.

> the text of the legislation, and then to any customs which have developed with respect to its application. Finally, we can turn to judicial decisions to the extent that they fill in gaps left by law or custom.

Pet. 12a (citations omitted). This is an incorrect statement of Spanish internal law as to treaty construction and leads to the Fifth Circuit's cumulation of errors on treaty interpretation.

II.

EXECUTIVE PRONOUNCEMENTS ARE SUPERIOR TO JUDICIAL DECISIONS AND PROPER DEFERENCE SHOULD BE ACCORDED TO THEM IN TREATY INTERPRETATIONS.

A. The *Impescamar* decision is irrelevant and inapplicable to this matter and to a Spanish interpretation of the 1926 Brussels Convention.

Spanish governmental interpretations of executive agreements are superior to judicial decisions. For that reason, amongst others discussed below, respondent's offering of the *Impescamar* case of the Superior Court of Justice of Andalucia, Op. Cert. 12, 1a, as binding Spanish law is incorrect. BCI's attempted legerdemain should be completely evident to the Court.[3]

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3. A Spanish court decision is *not* Spanish law, as any civilian jurist would know, and has no binding effect on any court in Spain, much less a United States court determining Spanish law. This instant matter is decided by a United States court determining Spanish law as a Spanish court would; not by a United States court applying selected language (which doesn't even amount to dicta) from a Spanish decision which is not law. In fact, a Spanish court would *not* be bound by the decision of any other Spanish court, particularly a court of first instance such as the Superior Court of Justice of Andalucia was in this case. Futhermore, it is conceded the case is on appeal to the Spanish Supreme Court and thus can have no weight at all.

(Cont'd)

Moreover, the two extracted parts of the decision are translated incorrecly and are totally misleading;[4] the case was decided on grounds not even related to the issues herein. Contrary to respondent's assertion, the truth is that the issues raised in the instant litigation were never addressed by the *Impescamar* court.

The denial of Tesoreria General's claim in the *Impescamar*

(Cont'd)

Even a Spanish Supreme Court decision would not be binding on a lower Spanish court. Article 1 of the Spanish Civil Code states that jurisprudence is *not* a source of law and only complements it. Thus, regardless of what the *Impescamar* case stands for, it is *not* Spanish law and it is *not* binding on a court deciding the instant case; Spanish law is set forth by the Spanish Constitution, Spanish legislation, or authoritative declarations from relevant sources, such as government ministries. The *only* law on the underlying issues in this matter is the declarations presented by Petitioner.

4. Although Tesoreria General does not wish to waste the Court's time with an irrelevant and inapplicable Spanish case, which is inconsequential to this Petition, respondent has so blatantly twisted the decision and its translation, that is must be addressed. Tesoreria General strongly disputes the accuracy of the translation proffered by BCI in that it changes the meaning and connotations of certain key phrases. Tesoreria General submits herewith an accurate translation of the *Impescamar* decision as Appendix A, and particularly directs the Court's attention to the correct translations of paragraphs 5, 6, 10 and 11.

This translation was made by undersigned counsel, a native Spanish speaker from Bogota, Colombia, with an extensive international practice, and Dr. Bernardo Bentata, a Venezuelan and Louisiana lawyer practicing with the undersigned. The translation and meaning was discussed with the Spanish attorneys who handled the *Impescamar* case itself.

Additionally, Tesoreria General wishes to point out the fact that while BCI protests Testoreria General's failure to follow the FRAP rules for supplementing the record with regard to the official letter to the Court from the Spanish Ministry of Foreign Affairs, it has made no attempt of its own to properly "supplement the record" to include this Spanish decision.

decision was based on prescription, the fact that the lien for social security contributions did not survive the sale of the vessel, and that the social security debt was not transferred as a personal solidary obligation to the subsequent owner. The M/V PLAYA DE YERBABUENA was sold in a judicial sale on February 13, 1981, and the court therefore cancelled all "charges and encumbrances, inscriptions and annotations which could have been made subsequent to the inscription of the mortgage." (Appendix A, p. 3a) The vessel was mortgaged in 1974. The claimed social security contributions corresponded to periods subsequent to the inscription of the mortgage and were therefore cancelled. Thus, the issue was not whether social security contributions created a lien, but only whether such an obligation survived the mortgage cancellation.[5]

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5. The undersigned spoke personally with the attorney representing Tesoreria General (Mr. Maximiliano Vilchez) and Mr. Emiliano Alegre, whose firm assisted Mr. Fernando Gonzalez de La Peña (Impescamar's counsellor), and they both confirm that the case had nothing to do with the ranking of social security contributions, and that in fact they *have* the ranking of a wage lien. They stated that the decision stood only for the proposition that the social security lien did not survive the judicial sale of the vessel nor attach to the subsequent owner. With respect to the specific mention of the 1926 Brussels Convention, they clarified that this referred only to the character of the vessel as an immovable and had nothing to do with liens. In the words of Mr. Emiliano Alegre, attorney for Impescamar, the issue was whether or not the vessel's subsequent owners were responsible for the prior obligations of the vessel, *including social security liens;* which presupposes their existence. Lastly, they confirmed that this was *not* an appeal, but a matter of first instance handled by the Superior Court. This first hand and personal information comports directly with a *proper* translation and proper reading of the decision.

It is also interesting to note, since BCI accuses Petitioner of not informing the Court of this decision, that Mr. Alegre's firm was apparently hired by BCI to assist Dr. Gonzalez de la Peña (presumably in an unsuccessful attempt to try and influence the direction of the case). BCI therefore has known of this decision for months and never brought it to the attention of the Fifth Circuit, probably for the same obvious reason that Tesoreria General did not — the decision has nothing

(Cont'd)

Paragraph 5 of the decision was offered by BCI, based on its inaccurate translation, as standing for the illogical proposition, in light of the entire decision, that the social security contributions did not create a lien. The proper translation of relevant portions reveals the fallacy of BCI's position:

> *FIFTH*: Pursuant to the Law of August 21, 1883 of Maritime Mortgages, *the vessel* is an immovable (art. 1), although for other purposes it is considered a movable (Art. 585 of the Commercial Code), therefore, as it pertains to the former, *the vessel* is responsible for all charges and encumbrances recorded in the Mercantile Registry of its port of registration, regardless of who is the owner; but if as a result of the foreclosure of the maritime mortgage securing a mortgage credit for the construction, the same is cancelled, then so too are the charges, encumbrances, inscriptions and annotations subsequently made in the Mercantile Registry, leaving *the vessel* free and clear of charges and encumbrances as an immovable (art. 50.2 L.H.N. [Law of Maritime Mortgage] and L.E. Civil), that resulted from the decree of April 1981 issued by Court No. 8 of First Instance of Madrid, which cancelled the annotation of preventive attachment of June 8, 1979, decreed by the Labor Magistrate of Cadiz for sums due the Social Security. In addition to the above, it must be borne in mind that, in accordance with articles 31 and 32 of

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(Cont'd)

to do with the 1926 Convention. BCI is now trying to raise a last minute smokescreen in a bold and inappropriate attempt to mislead this Court with information it knows to be incorrect.

> the Law of Maritime Mortgage and art. 2, 3 and 8 of the Brussels Convention of April 10, 1926, the Social Security contributions are not "privileged credits that follow *the vessel*, notwithstanding a change in *her* owner", since there is no national law that grants *it* [*the vessel*] such character. [emphasis added].

The grammatical and substantive subject of the passage is "the vessel," which as an immovable, allows mortgages, liens and encumbrances to be placed on her.[6] In *Impescamar* the sale by court decree erased the prior social security liens registered against the vessel on June 8, 1979, such that these did not survive the sale of the vessel. No Spanish law gives *the vessel* (not the social security contributions, as misconstrued by BCI) the special character of allowing liens to follow against her owner after her sale.[7] This is quite different from stating that social security

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6. The language quoted by respondent from paragraph 11 (Resp., p. 11a) merely stands for the proposition that the payments were not due by *Impescamar* because *after* the mortgage was cancelled they did not attach to the vessel — which is quite different from concluding that the contributions did not create a lien in the first place.

7. Indeed, Articles 31 and 32 of the Law of Maritime Mortgages refer to immovables, *not* to liens. Articles 2, 3 and 8 of the 1926 Convention similarly refer to liens and whether they follow the vessel after a change in ownership. Article 8 specifically states: "claims secured by a lien follow the vessel into whatever hands it may pass." In this instance this principle was nullified by the sale of the vessel and prescription.

It is clear from the decision itself that the only issue was the liability of Impescamar, as owner of the vessel PLAYA DE YERBABUENA, and/or as successor to the vessel, and *not* the lien status, since immediately following paragraph five the court states:

"*SIXTH:* Having discarded the responsibility of

(Cont'd)

contributions do not have wage lien status because no Spanish law gives them that character. BCI has the wrong tail wagging the wrong dog.

Had the issue been, as respondent seeks to create, whether social security contributions gave rise to a maritime lien on the vessel, it would have been easily disposed of by simply referring to the court's ruling canceling all charges and encumbrances subsequent to recordation of the mortgage, or by a simple "no," if no lien existed. The fact that the court went through exhaustive additional analysis indicates that the contributions give rise to a lien, and the issue was whether and in what form, such lien survived the sale of the vessel. In conclusion, the *Impescamar* decision did not involve any of the issues before the Fifth Circuit or this Court, and specifically not the issue of deference to the executive branch, and is of no consequence for the procedural and substantive reasons stated.

Finally, BCI asserts that this Court should not grant the Petition for a Writ of Certiorari because the Government of Spain has other remedies to rectify the future impact of the Fifth Circuit's decision. Clearly, this is not the standard for determining whether certiorari should be granted. The mere possibility of prospective legislative relief is not a valid reason for failing to rectify erroneous judicial precedent, particularly where the import of this decision goes far beyond the limited issue of whether Spain does, or does not, afford preferred maritime lien status to social security contributions. It goes to the very heart of principles of judicial

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(Cont'd)

> Impescamar, S.A. as *owner* of the vessel PLAYA DE YERBABUENA, we proceed to analyze if it has *personal responsibility as a result of being a successor of previous businessmen. . .*"

Id. (emphasis added).

deference and international comity and, if left to stand, will have an adverse impact on the manner in which international treaties, and even domestic executive orders, are interpreted and enforced.

If left unreviewed, the Fifth Circuit's decision will frustrate principles of international comity. As this Court noted in *Hilton v. Guyot*, 159 U.S. 113 (1895), "[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the right of its own citizens or of other persons who are under the protection of its laws." *Id.* at 163-64. This principle has been implicated in recent cases decided by this Court, *see, e.g., Hartford Ins. Co. v. California*, 113 S. Ct. 2891 (1993), and is profoundly at issue here. If the courts of the United States do not, as a matter of foreign law, defer to the properly-formulated interpretations of treaties embraced by friendly, foreign governments, how can our citizens expect the same treatment abroad? The Fifth Circuit's decision imperils respect of United States and foreign executive orders, and this Court should not be duped by respondent's attempts to avoid, or minimize the importance, scope, and relevance of, the issue before the Court.

CONCLUSION

For the foregoing reasons, along with those previously presented, the Petition should be GRANTED.

Respectfully submitted,

DEREK A. WALKER
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Attorneys for Petitioner

APPENDIX A — DECISION OF FEBRUARY 12, 1993 OF THE SUPERIOR COURT OF JUSTICE OF ANDALUCIA

A.M.P.A.

DON NARCISO RODRIGUEZ ESCOBAR, Secretary of the Second Section of the Chamber of Administrative Law Disputes in Seville of the Superior Court of Justice of Andalucia.

I CERTIFY: That in the case that is referred to below, the Chamber has rendered the following:

JUDGMENT

Illustrious Messrs.

D. Rafael Osuna Osios
Da. Amalia Basanta Rodriguez
D. Rafael Fernandez Lozano

In the City of Seville, the 12th of Febuary of 1993.

Before the Chamber of Administrative Law Disputes in Seville, of the Superior Court of Justice of Andalucia, Case No. 1071/90, filed by the entity "IMPESCAMAR, S.A.," domiciled in Seville, represented by Attorney D. Manuel Perez Perera and defended by Counsellor D. Fernando Gonzalez de la Peña, against resolution of the Ministry of Labor and Social Security, represented and defended by the State Attorney. Tesoreria General de la Seguridad Social is a co-defendant party, represented and defended by Counsellor D. Maximiliano Vilchez Poras. The amount at issue was fixed at eleven million six hundred thirty-four thousand six hundred twelve pesetas.

Appendix A

BACKGROUND

FIRST - In its written petition, the plaintiff requests that this Chamber render judgment annulling the challenged resolutions, with the other corresponding pronouncements of record.

SECOND - In its answer, the defendant requests a judgment dismissing the petition filed.

THIRD - The plaintiff interposed a petition for reconsideration of the decision of 2 October 1991, giving notification to the defendant and the co-defendant, bringing forth this petition of allegations. This chamber issued a ruling dismissing said request. The co-defendant answered the petition requesting the inadmissibility of the case.

FOURTH - The parties were requested to present their written conclusions required by Article 78 of the jurisdictional Law, and complied with said formality through their corresponding pleadings.

SIXTH - The legal requisites have been complied with throughout the proceeding.

WHEREAS the judge rendering this decision is the Illustrious Magistrate Judge D. Rafael Fernandez Lozano.

PRINCIPLES OF LAW

FIRST - For greater clarity of the contested issue, one should bear in mind the following: A) The vessel PLAYA DE YERBABUENA, registered in Book 7 of Vessels, folio 241, page No. 261, inscription 2nd of the Mercantile Registry of Santander,

Appendix A

built by Astilleros de Santander, S.A. for Pesquerias de Barbate, S.A., as owner, and from which it acquired the possession and dominion on 22 August 1974, was mortgaged since 26 February 1974 with a mortgage securing a mortgage credit for the construction of the vessel granted by CREDITO SOCIAL PESQUERO [social credit for fishing] on 17 December 1973. Its mortgage credit not having been satisfied, said entity exercised the real mortgage action to make effective its credit on 3 April 1978, the handling of which corresponded to the Court of First Instance No. 8 of Madrid, under No. 504/76, which decreed the embargo [attachment] of the vessel and its annotation in the Mercantile Registry of Santander, which took place on 4 January 1977. Said Court, over the objection of Pesquerias de Barbate, S.A. sold the vessel on 10 February 1981 to Credito Social Pesquero (f.275 record) and by ruling of the month of 1981, cancelled the maritime mortgage and the corresponding annotations of attachment, "and the other charges and encumbrances, inscriptions and annotations which could have been made subsequent to the inscription of the mortgage." (F.304 record). Among said annotations appeared in the Mercantile Registry of Santander, a preventive attachment annotation on the vessel dated 8 June 1979, decreed by the Labor Magistrate Court of Cadiz, in connection with unpaid social security contributions, which was prosecuted at the request of the Instituto Social de la Marina [Maritime Social Institute] against Pesquerias de Barbate, S.A. seeking recovery of 17,000,000 [pesetas]. (f.243 record).

Credito Social Pesquero sold the vessel to D. Florentino Puerta Oviedo and his wife Da. Maria Juana Medina Gomez on 14 June 1985 (f.305 record), who in turn sold it on 11 November 1985 to Puerta y Sola, S.A. (f.320 record) which changed its name to IMPESCAMAR, S.A. on 2 December 1985 (Power of Attorney), which sold it to "SOCIETE D'ARMEMENT ET DE PECHE AL MOONIA, S.A." on 12 December 1985 (f.333).

Appendix A

SECOND - On a specific date which is unknown but is certainly in 1986, the plaintiff IMPESCAMAR, S.A. requested from the Directorate General of Exports, a dependency of the State Secretariat of Commerce, of the Ministry of Economics and Treasury, an export license for the vessel destined to the referenced French company, which was "DENIED. Because of unfavorable report of the competent Agency" with a date which does not appear (f.330 record). In said report, the Director General of the Maritime Social Institute, states on 9 April 1986 (Document 2 of the complaint): With respect to your request dated 26 February last, registered with exit number 37/541, of 4 March, concerning the export of the vessel "PLAYA DE YERBABUENA," I communicate to you the following: 1—In accordance with the report of the Provincial Delegation of Cadiz and with certification issued by the Section of Control and Contributions of this Institute, said vessel has unpaid contributions for the periods November 1979 to December 1980, March 1981 to June 1982 and August to October of 1982, in the total amount of 6,479,135 pesetas; 2—In accordance with that established in Article 9 of the Compilation Text of the Special Regime of the Social Security for Workers at Sea, approved by Decree 2664/1974 of 30 August, an unfavorable decision is reported for the deletion of the flag for the export of said vessel.

THIRD - Petitioner challenges in this action the resolutions dated September 11 and 265 (sic) November, 1987 of the Territorial Treasury of the Cadiz Social Security, which dismissed the petition filed on February 7, 1987 for reimbursement of 11,034,612 pesetas, plus interest, and the Motion to Set Aside filed on the following 20-9 (fs. 1 and 106 record) and the Petition filed by the Provincial Directorate of the Maritime Social Institute of Cadiz, of presumptive denial of its petition dated February 7, 1987 for deposit "for damages" "of the amount of 3,900,000 pesetas, for the delay in exporting the vessel . . . caused solely by its

inappropriate and illegitimate actions, demanding payment of contributions . . . they did not owe."

In the petition, it [the plaintiff] alleges, in addition to requesting the nullity of said agreements, a series of claims which are foreign to this proceeding, as will be stated.

The Territorial Treasury, besides raising the exception of inadmissibility set forth in Article 81, (g) of the Jurisdictional Law, bases its opposition on Articles 24.1(b) and 25 of the Regulation of the Special Regime of the Sea. The state attorney alleges that the action is inadmissible since the report of the Maritime Social Institute is not a challengeable administrative act since it is an act in a new proceeding, and [even] if it were not, the administrative procedures were not exhausted.

FOURTH - With respect to the causes of inadmissibility alleged by Tesoreria and the State Attorneys, one has to bear in mind that the Maritime Social Institute decree challenged is not the pleading issued on 9 April 1980, previously transcribed, nor the denial of the export license, but rather the presumptive denial by the Provincial Directorate of Cadiz of the petition filed on 7 February 1987 requesting the indemnity of 3,900,000 pesetas for damages sustained because of the delay in exporting the vessel, as a result of being denied the export license because of the disputed resolution, and said resolution of presumptive denial does not exist since the petitioner has not denounced the delay (Article 94 L.P.A. and 38.1 L.J.) for which reason the causes of inadmissibility alleged by the defendants do not exist and that provided by Article 82(c) with regard to 38.1 of the Jurisdictional Law, was not alleged; but said issue is of no moment from the point in time when the petitioner abandons said claim in the petition and substitutes it for that of indemnity for damages, in the initial amount of

5,500,000 pesetas "for the erroneous forwarding to the Social jurisdiction," which cannot be adjudicated in this proceeding, since the initial brief of this administrative law matter is the one that establishes the limits of the proceeding (Articles 57 L.J. and S.T.S. 11.11.69 and 11.3.90, among others).

FIFTH - Pursuant to the Law of August 21, 1883, of Maritime Mortgages, the vessel is an immovable (Article 1), although for other purposes it is considered a movable (Article 585 of the Commercial Code), therefore, as it pertains to the former, the vessel is responsible for all charges and encumbrances recorded in the Mercantile Registry of its port of registration, regardless of who is the owner; but if as a result of the foreclosure of the maritime mortgage securing a mortgage credit for the construction, the same is cancelled, then so too are the charges, encumbrances, inscriptions and annotations subsequently made in the Mercantile Registry, leaving the vessel free and clear of charges and encumbrances as an immovable (Article 50.2 L.H.N. [Law of Maritime Mortgage] and L.E. Civil), that resulted from the decree of April 1981 issued by Court No. 8 of First Instance of Madrid, which cancelled the annotation of preventive attachment of June 8, 1979, decreed by the Labor Magistrate of Cadiz for sums due the Social Security. In addition to the above, it must be borne in mind that, in accordance with Articles 31 and 32 of the Law of Maritime Mortgage and Articles 2, 3 and 8 of the Brussels Convention of April 10, 1926, the Social Security contributions are not "privileged credits that follow the vessel, notwithstanding a change in her owner," since there is no national law that grants it [the vessel] such character.

SIXTH - Having discarded the responsibility of IMPESCAMAR, S.A. as owner of the vessel PLAYA DE YERBABUENA, we proceed to analyze if it has personal responsibility as a result of being a successor of previous

businessmen whether they are shipping interests, [ship] operators, or owners of the vessel. The Administration alleges that the petitioner is solidarily liable for the Social Security quotas which accrued prior to the purchase of the vessel as set forth in Article 24.2(b) of the Regulation concerning the Special Regime of the Social Security for Workers at Sea approved by Decree 1867/70 of 9 July and for not having requested from the Maritime Social Institute an accredited certificate regarding the status of the previous Company with respect to its obligations for contributions under said Special Regime; a solidary responsibility which this Chamber cannot accept due to the general rule that for an obligation to have solidary character, it has to be expressly constituted as such (Article 1131 C. Civil), and that it is a Law and not a general order of inferior juridical rank which has to declare the solidary liability (see Article 37 of the General Tributary Law).

This is corroborated especially for the payment of Social Security debts by those solidarily responsible in Article 10.1 of the General Regulations for Collection of the Social Security, approved by R.D. 716/86, of 7 March and Article 6 of the Order of 23 October 1986, which the former develops, in establishing: "The solidary responsibility for the payment of Social Security debts derives from the fact that the responsible party is liable on the assumption that under the regulatory norms of the different authorities of the Social Security system, said responsibility is expressly imposed," in other words, "on the assumption that legally or conventionally such responsibility is expressly imposed," requiring that the legal norm by the nature of solidary responsibility, be a Law, and not any general provision of inferior rank.

SEVENTH - Indeed, Article 24.2(b) states "The acquirer, in the cases of succession of title of a vessel or exploitation, will

respond solidarily with the previous title holder or with his rights for the payment of the contributions accrued prior to said succession," but it is the case that said precept lacks legal coverage, which renders it a nullity at law in conformity with Articles 47.2 L.P.A. and 28 L.R.J.A.E., and although this Chamber lacks competence to declare the nullity of said precept, it does have competency to adjudicate its individual application on the basis that same is not in conformity with Law (Article 39.4 L.J.); control of the obligatory jurisdiction of the Administration which is imposed under Article 8 of the L.O.P.J.

Said Regulation is developed in Law 116/1969 of 30 December concerning the Special Regime of Social Security of Workers at Sea, which does not contain any express precept which authorizes the solidary responsibility of Article 24.2(b) which has been cited, and repealed whatever laws and provisions are opposed to that established in same. Subsequent to the Regulations of 1970, through Decree 2864/1974, of 30 August the Compiled Text of Laws 116/69 and 24/72 of 21 June and its Articles 7, 9, 11, 15 and 17, solidary responsibility is not assumed in any way between the acquirer of the vessel and its previous owner, only Article 9 imposes the obligation of ascertaining that the vessel is inscribed in the Registry of the Promoting Entity and "is found current in the payment of contributions" but only as a necessary requirement "for the Maritime authorities to authorize its departure to sea," but without any possibility that the non-fulfillment of said obligation converts the violator in a subrogee of the pending obligations and solidarily responsible for the quotas corresponding to the previous owners of the vessel. Neither does the Compiled Text of the General Social Security Law, approved by D.2065/1974 of 30 May establish the questioned responsibility, although only [under] the solidary responsibility of Article 97.2, based on Chapter III "Protecting Action" and Section 2nd "General Regime of Contributions," in which it is contained, as well as [based on] its

content: "the purchaser will respond solidarily with the [owner] or its heirs for the payment of contributions caused prior to said succession," [the compiled text] does not permit the establishment of a solidary responsibility with respect to the pending contributions in the "cases of succession in the title of the exploitation, industry or business," and if so, only with respect to payment of pensions.

EIGHTH - In the cases of succession of title of vessels, Article 25.1 of the Regulation of 1970-D.1867/70 of 9 July, only empowers the purchaser, and does not require the "request[ing] from the Maritime Social Institute the issuance of an accredited certificate of the status of the Company with respect to its obligations for payment of quotas to said Special Regime" without the non-use of this power implying a solidary responsibility, especially when said precept lacks the legal coverage required to allege said solidary responsibility.

NINTH - The State Attorney alleges that the solidary responsibility of successor companies is covered by article 44 of the Worker's Statute of 1980, which is not admissible since what said precept establishes is that the new businessman shall be "subrogated in the labor rights and obligations of the previous [company]," leaving the assignee and the assignor "both responding solidarily during three years for the labor obligations which arose prior to the proceeding and which were not satisfied," precept, which by being included in Section 2 of Chapter III: Modification, suspension and extinction of the labor contract, "cannot refer to the Social Security quotas owed by the previous owner, but only to the existing labor relationships between the employees of the previous company and the acquirer of same.

TENTH - Neither can one forget that in accordance with

Appendix A

Articles 43 to 45 of R.D. 716/86 and Article 37.1 of the Order of 23 October 1986, norms already cited, the obligation for payment of Social Security quotas prescribes in five years, beginning with the date they should have been perceptively paid and it will be applied officially in the collection proceedings for both the voluntary period as well as by a judicial collection proceeding. When the petitioner paid on 9 January 1987 the 11,624,612 pesetas, the return of which it claims in this proceeding, and which payment was made "without representing recognition of any debt or responsibility, without prejudice and reserving all rights of actions", the quotas which should have been paid prior to 9 January 1982 were prescribed; of those paid in the Magistrate Labor Court of Cadiz (fs. 22 and 23 rec.), clearly those corresponding to Pesquerías de Barbate, S.A. were prescribed since they were for the year 1970, without knowing their amount, and those paid in the name of Diego Grimaldi, S.A., and in the voluntary period, likewise those corresponding to the period April to December 1981 in the amount of 3,439,328 pesetas (f.14 rec.); concerning the rest, there is not sufficiently clear information in order to opine on their prescription.

ELEVENTH - Whether the quotas which were owed were 11,634,612 pesetas, 6,470,135 or 5,310,031 pesetas or another amount, a question which arises because of the diverse and contradictory certifications which are found in the file and decrees, is totally irrelevant since what is requested by the petitioner is the return of the first amount as an improper payment effected on 9 January 1986; a right which is conceded by Section 3 of Chapter IV of Title I of the Order of 23 October 1986 and Article 59 of the Compiled Text 1974-D2065 of 1974, and although subordinated to a requirement that the amounts "were paid through error of fact or law", in the present case, the return is even more justified, since the petitioner was not obligated to the payment of said quotas, since

these were not charges which would weigh on the vessel, nor any solidary responsibility whatsoever, and if these payments were made under formal protest and due to the negative [response] of the Administration in not granting the export license to the vessel as a consequence of the report issued by the Maritime Social Institute to the effect that the vessel had unpaid social Security quotas, in the total amount of 6,479,135 pesetas, which is not true as has been reasoned, which is why we proceed to accede to the return [of the payments].

TWELFTH - We do not find that bad faith or temerity exists which would warrant the imposition of costs.

WHEREAS, having considered the cited articles of general application,

WE RULE: That rejecting the causes of inadmissibility offered by the State Attorney and Tesorería de la Seguridad Social and finding [the] Resolutions of 11 September and 26 November 1987 of the Tesoreria Territorial de la Seguridad Social de Cadiz not to be in accordance with Law, we void same finding them contrary to the juridical Order, and we accede in part to the claims pled by IMPESCAMAR, S.A. in its petition, ordering Tesoreria to return to the petitioner ELEVEN MILLION SIX HUNDRED THIRTY-FOUR THOUSAND SIX HUNDRED TWELVE pesetas, plus legal interest from 9 January 1987 until the date of payment, and in any event, we hold prescribed those quotas which are prior to 9 January 1982; without costs. And in due course with a certification of this judgment for its fulfillment, we return the administrative file to its place of origin.

Thus, this our judgment, definitively ruling, and we pronounce, order and sign same.

Appendix A

SIGNATURES

That inserted [hereinabove] comports to the letter with its original which I forward, the judgment remaining deposited in the Secretariat. And to confirm same, I issue the present,

SIGNATURES

SEAL

APOSTILLE (or sole legalization)

(Hague Convention of 5 October 1961
Royal Decree/1978 of 2 October)

1. Country: Spain

The present public document.

2. Has been signed by D. NARCISO RODRIGUEZ ESCOBAR.